In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 890

GO-BART IMPORTING COMPANY, INC., PHILIP D. Gowen and William Bartels, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the District Court (R. 84) nor that of the Circuit Court of Appeals (R. 110) has as yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 15, 1930. (R. 120.) The petition for certiorari was filed May 12, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioners were entitled to the return of documents alleged to have been illegally seized as an incident to the arrest of petitioners Gowen and Bartels, the two principal officers of petitioner corporation, and to the suppression of such documents as evidence.

STATEMENT

On June 5, 1929, a warrant for the arrest of petitioners Gowen and Bartels and others was issued by a United States Commissioner for the Southern District of New York directed to the Marshal for that District. (R. 28.) The warrant was based on a complaint of Special Agent in Charge Calhoun, of the Bureau of Prohibition, verified June 5, 1929, which charged them with being parties to a conspiracy to violate the National Prohibition Act (R. 30), but failed to show any facts to sustain the charge or to justify the issuance of the warrant.

Certified copies of the warrant and complaint were placed in the hands of Prohibition Agent O'Brien who, on June 6, 1929, went to the office of the Go-Bart Importing Company, accompanied by two other agents, and arrested petitioners Gowen and Bartels, the President and Secretary and Treasurer, respectively, of the Company. The persons of Gowen and Bartels and the offices of the company were thereupon searched and various papers and documents seized and removed to the offices of the prohibition authorities. (R. 47–50.)

In August, 1929, a motion was filed in the District Court for the Southern District of New York, bearing the same title as the criminal proceeding pending before the United States Commissioner and supported by the affidavit of each petitioner (R. 1, 4–27), which demanded the return of the documents and papers to the petitioners and the suppression of their use in evidence.[1] Pursuant to such motion the District Court issued an order to show cause (R. 1–3), to which affidavits were filed in response.

The affidavit of Ernest Braidwood (R. 33–42), an informer but not a Government employee, alleged that from 1927 to 1929 he dealt with petitioners Gowen and Bartels (hereinafter, for brevity, referred to as the petitioners) directly in the offices in which they were arrested, buying liquor from them, receiving instruction in the methods of conducting their business of importing and selling liquor, visiting their hidden storehouses and generally being admitted to the secrets of their illicit business. The affidavit described plans of petitioners to smuggle liquors into the country and showed that petitioners formed the Go-Bart Importing Company, Inc., after the advent of prohibition, for the express purpose of handling liquor. The affidavit clearly establishes that for

[1] Some of the documents and papers apparently belong to the Go-Bart Company (R. 25), but no attempt is made in the affidavits to segregate those belonging to the corporation from those of the individual petitioners, and no point is made in the petition for certiorari based on any technical ownership of the papers in the corporation.

nearly two years petitioners participated as principals in the commission of the felony for which they were arrested.

The affidavit of William J. Calhoun, Special Agent in Charge (R. 43–45), set forth that all these facts were communicated to him by Braidwood and that he had by independent means checked and verified them and had in turn communicated them to his subordinate, Prohibition Agent O'Brien, who made the arrests and seizure.

O'Brien's affidavit (R. 46–50) stated that he arrested petitioners in the office of the Go-Bart Company; that a search of the persons of petitioners and the immediate premises disclosed both liquors and documents vital to the conduct of the criminal enterprise; and that these were seized. No demand was made in this proceeding for the return of the liquor.

Affidavits by the two prohibition agents who accompanied O'Brien, relating the details of the arrests and the search and seizure, were also filed. (R. 78–83.)

After a hearing the District Court denied the motion for the return of the papers. (R. 84–88, 99.) A motion for rehearing was also denied. (R. 97–99.) On appeal the Circuit Court of Appeals affirmed the order of the District Court except in one respect (not material here), as to which it modified the order. (R. 110–121.)

ARGUMENT

Petitioners contend that the search and seizure should not be sustained, because the agents in obtaining the warrant made an insufficient complaint, appropriated a warrant directed to the United States Marshal and searched petitioners' premises upon a representation that they had a search warrant. They further contend that the procedure in this case violated their rights under the Fourth Amendment, because it amounted to an exploratory search for incriminating evidence by an agent acting on information communicated to him by another officer who had in turn received it from a third person.

Since the warrant of arrest was based upon an insufficient complaint and was addressed to the Marshal instead of to the prohibition agents, no attempt was made by the Government to justify the seizure under the warrant. (R. 85.) Agent O'Brien alleges in his affidavit that he made no attempt to serve the warrant of arrest (R. 49) but merely took it with him "for the purpose of reference as to the names of the various defendants." (R. 48.) The other officers also allege that no warrant was served at any time. (R. 79, 82.) This is contradicted by the moving affidavits of petitioners, who charge that O'Brien asserted that he had a search warrant and an arrest warrant and exhibited a paper to justify his demand for a search of the offices. (R. 5, 13, 51, 54.)

The District Court was inclined to accept the story of petitioners, but nevertheless held that this did not invalidate the seizure as an incident to the arrest,

which was one that could lawfully be made without a warrant. (R. 85–86, 88.) The Circuit Court of Appeals called attention to the fact that no return was made under the warrant, and stated that it was doubtful whether an officer who makes no return of service of a warrant can be said to act under it. It intimated that an officer who tells the accused that he acts under a warrant can justify only by showing a legal warrant, and held that, even assuming that O'Brien purported to act under the warrant, the contention that he may not otherwise justify can not be sustained. (R. 113.)

This ruling was based upon this Court's decision in *Stallings* v. *Splain*, 253 U. S. 339, 342, where it was held that the possession of an insufficient warrant did not render illegal an arrest which could lawfully be made without it. See also *Marron* v. *United States*, 275 U. S. 192, 198–199; *Vachina* v. *United States* (C. C. A. 9th), 283 Fed. 35, 36; *Fryer* v. *United States* (C. C. A. 6th), 3 F. (2d) 558; *Billingsley* v. *United States* (C. C. A. 8th), 16 F. (2d) 754, 756; *Lee Kwong Nom* v. *United States* (C. C. A. 2d), 20 F. (2d) 470, 472.

If the arrests were lawfully made, the contemporaneous search of the persons of the petitioners and of their offices, and the seizure of "things connected with the crime as its fruits or as the means by which it was committed" were justified. *Agnello* v. *United States*, 269 U. S. 20, 30; *Carroll* v. *United States*, 267 U. S. 132, 158; *Lee Kwong Nom* v. *United States*, *supra*, p. 472.

We submit that the arrests were lawful. The prohibition agent making them had at least the authority of a private person to make an arrest without a warrant. Where a felony has in fact been committed, a private person may arrest without a warrant if he has reasonable ground to believe that the person arrested committed the crime. *Brady* v. *United States* (C. C. A. 6th), 300 Fed. 540, 543; *Burns* v. *Erben*, 40 N. Y. 463, 466; Bishop's New Crim. Proc., 2d Ed., Vol. 1, par. 181 (2). See also *Kurtz* v. *Moffitt*, 115 U. S. 487, 498. In the *Carroll case*, *supra*, this Court said (p. 161):

> The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, * * * has led to frequent definition of the phrase. In *Stacey* v. *Emery*, 97 U. S. 642, 645 * * * this Court defined probable cause as follows:
>
> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The information constituting probable cause may be obtained from others as well as from personal observation, provided the facts are clearly established and are sufficient to warrant a man of reasonable caution in the belief that the person arrested is guilty of the crime charged. *Carroll* v. *United States*, *supra*, p. 157; *Brady* v. *United States*, *supra*; *King* v. *United States* (C. C. A. 9th), 1 F. (2d) 931; *White* v. *United States* (C. C. A. 9th), 16 F. (2d)

870, 871; *United States* v. *Rembert* (S. D. Tex.), 284 Fed. 996, 1001.

Both courts below were of the opinion that the affidavits establish not only that a felony had been committed, but also that Agent O'Brien had, prior to the arrests, reasonable cause to believe that petitioners were parties to its commission. (R. 87, 114–115.) If their conclusions were correct (and we submit that they were), it follows that the arrests, as well as the contemporaneous search and seizure of the papers and documents as an incident thereto, were lawful.

Petitioners' characterization of the agents' conduct as a ransacking of the offices in a general and exploratory search for incriminating papers is not justified. Following the arrests the authority of the agents to search for and seize the things used to carry on the criminal enterprise extended to all parts of the premises employed for the unlawful purpose. *Marron case*, *supra*, p. 199.

The papers seized included index lists with names and addresses of customers, together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold, and delivered; ledger accounts setting forth exact purchases of liquors made by particular customers, the amounts due, and payments made thereon; and letters and other correspondence having to do with the purchase, sale, and delivery of intoxicating liquors. (R. 50.)

As was said with respect to the ledger and bills in the *Marron case*, p. 199, they constituted part

of the equipment actually used to commit the offence. They were convenient, if not in fact necessary, to the conduct of the unlawful enterprise, and as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on.

United States v. *Kirschenblatt*, 16 F. (2d) 202, upon which petitioners strongly rely, was decided by the same Circuit Court of Appeals that decided the instant case. In its present opinion the court said (R. 118): "We do not think it can stand after the *Marron* decision." The same may also be said of *United States* v. *Henderson* (C. C. A. 4th), 12 F. (2d) 528, if indeed, as petitioners contend, it conflicts at all with the instant decision.

CONCLUSION

The case was correctly decided below, and there is no such conflict of decisions as to justify a review by this Court. The petition should therefore be denied.

Respectfully submitted.

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